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BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35468

PINELAWN CEMETERY –
PETITION FOR DECLARATORY ORDER

ENTERED
Office of Proceedings

JUL 28 2011

Part of
Public Record

**REPLY OF THE LONG ISLAND RAIL ROAD
TO AMENDED PETITION FOR DECLARATORY ORDER**

The Long Island Rail Road Company ("LIRR") hereby replies to the Amended Petition for Declaratory Order filed in this proceeding by Pinelawn Cemetery, Inc. ("Pinelawn").

The LIRR has been providing railroad freight and passenger service on Long Island, New York since 1837. With the Island's increasing suburbanization, the State of New York realized that it needed the LIRR to assure commuter access to Manhattan, and consequently LIRR was purchased by the Metropolitan Transportation Authority in 1966. Subsequently, LIRR and the State of New York concluded that the public was best served by separating LIRR's commuter and freight functions. Accordingly, in 1997, LIRR "privatized" the freight operation by entering into a 20-year lease of the freight franchise and freight properties. New York & Atlantic Railway Company ("NY&A") currently operates LIRR's freight franchise and freight properties, including its Farmingdale Yard in Babylon, New York, under a Transfer Agreement that was approved by the Surface Transportation Board.

The dispute that Pinelawn brings to this Board challenges the railroads' possession of almost half of LIRR's Farmingdale Yard. Pinelawn owns a vast cemetery adjacent to the

Farmingdale Yard, and it first leased the disputed parcel to LIRR in 1904 for 99 years. A second adjacent parcel was also leased by Pinelawn to LIRR for 99 years in 1905. Both leases were renewable for a second 99 year term.

The Farmingdale Yard had been used exclusively for the freight and ancillary operations of the LIRR for decades when it was transferred to NY&A in 1997. Today, the availability of Farmingdale Yard for freight rail operations is an immediate concern for NY&A, and for that reason NY&A has prepared and filed the principal opposition to Pinelawn's Amended Petition. LIRR has a parallel and significant interest in this proceeding, and supports the NY&A Reply in this matter.

LIRR's interest, however, both predates NY&A's and may continue well after NY&A's possession of the facility. LIRR leased the subject parcel from Pinelawn over a hundred years ago. LIRR built and used the Farmingdale Yard for various, evolving freight purposes and occasional passenger purposes over that time. It is LIRR's renewal of the 1904 Lease that is being challenged in the underlying action pending in New York Supreme Court, Suffolk County that gave rise to this declaratory order proceeding. More important however, is that LIRR has a residual common carrier obligation on the rail line that connects with the Farmingdale Yard, and LIRR will be required to either operate that line or contract its operation to another entity if for some reason NY&A ceases to operate. Consequently, it is important to stress to this Board that NY&A is not the only freight railroad that would be directly and adversely affected by any Board order granting Pinelawn's request.

Submitted with this Reply is the Verified Statement of John B. Curcio, Deputy General Counsel of the LIRR, which documents the long history of the Farmingdale Yard as a freight facility. Mr. Curcio also explains the real estate dispute Pinelawn has raised in the New York

state courts. Of prime importance in this proceeding however, the statement confirms the significance of maintaining the availability of the Farmingdale Yard for freight operations long into the future. Despite the murky and sometimes contradictory arguments of Pinelawn in these and related proceedings, there can be little doubt that the Farmingdale Yard has been and will continue to be a unique and vital piece of railroad infrastructure that must continue to be available for future generations of shippers on Long Island.

For the present, NY&A has the right to use Farmingdale Yard pursuant to the terms of the Transfer Agreement previously approved by this Board. However, the position taken by Pinelawn would allow it to remove permanently this parcel from railroad use, to destroy the value of the remaining parcel for railroad operations, and to preclude future railroad operations by LIRR or its operator(s). It is the LIRR's intention that the Farmingdale Yard continue to be utilized for freight rail operations into the distant future.

LIRR is confident that it will prevail in defending against the specious claim by Pinelawn with respect to the renewal and reinstatement of the 1904 Lease in the pending state court action,¹ so it is unlikely that those courts will ever address the question of the remedies sought by Pinelawn. LIRR concurs with NY&A that this Board should simply decline to issue the requested declaratory order because the jurisdictional issue that led Pinelawn here has now been resolved, rendering this issue moot. However, if this Board decides to address Pinelawn's claims on the merits, it should advise that the New York state courts are the appropriate body to resolve questions of state law (*viz.*, whether the renewal and reinstatement of the 1904 was valid and effectual), but they would be without jurisdiction to award relief that would interfere with the continuing and future use of Farmingdale Yard for railroad operations.

¹ Pinelawn's President did sign an explicit renewal and reinstatement of the 1904 Lease, and Pinelawn did deliver that written document renewing and reinstating the Lease.

Accordingly, we respectfully request that Pinelawn's Amended Petition be denied.

Dated: Central Islip, NY
July 28, 2011

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. Safar", written over a horizontal line.

Jay Safar
Law Offices of Jay Safar
Attorneys for LIRR
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Central Islip, NY 11722

**VERIFIED STATEMENT
OF
JOHN B. CURCIO**

1. I am the Deputy General Counsel of the Long Island Rail Road ("LIRR"). I am fully familiar with the facts and circumstances set forth herein, based upon my own personal knowledge, and from records and documents of the LIRR with which I am familiar.

2. The Farmingdale railroad yard in Babylon, NY has been an operational railroad facility for over a century. The real property beneath the yard is comprised of two parcels, each leased from Pinelawn Cemetery ("Pinelawn"). The southernmost parcel, adjacent to the Long Island Rail Road mainline, was first leased in August, 1904 for a term of 99 years. The northernmost parcel was leased from Pinelawn in November 1905, also for a term of 99 years. Both leases explicitly contemplated that the rail yard would remain in LIRR's possession effectively in perpetuity, since they both contained renewal provisions for an additional 99 year term.

3. The Farmingdale Yard has long consisted of a "wye" track with two spur tracks extending several hundred feet. We believe that LIRR constructed the tracks soon after taking possession of the parcels, very early in the 20th Century. Although built on two parcels, the yard constitutes and has been utilized over the years as a single integrated railroad facility. We believe its earliest uses included serving as a team track for transloading freight between train cars and trucks or wagons, as well as a location for turning locomotives and trains.

4. Since the early 20th Century, the Farmingdale Yard has been in continuous use as a railroad yard to support both the freight and passenger operations of the Long Island Rail Road. LIRR consistently used the Farmingdale facility for transloading freight between rail cars and highway vehicles. Prior to the privatization of its freight operation, LIRR for

many years used the Farmingdale Yard to transload various types of freight, including telephone poles, brick, and plastic pellets. LIRR also used the yard for taking delivery of ballast. In addition, LIRR conducted an intermodal operation at the yard, in which it loaded highway trailers onto rail cars and vice versa. LIRR also brought its trash from its entire system to Farmingdale, where it was compacted and reloaded into trucks for disposal at a landfill. LIRR described the facility as a "waste transfer station." LIRR also stored materials in the yard for its maintenance of way and signal departments.

5. In November of 1996 LIRR privatized its freight operations by entering into a Transfer Agreement with New York & Atlantic Railway Company ("NY&A") pursuant to which, among other things, LIRR ceased its freight operations and transferred its common carrier rights and obligations to NY&A for a period of 20 years, with the right to renew for an additional 10 years. Under the Transfer Agreement, NY&A pays LIRR a fee for every carload of freight that moves over the railroad. These freight fees partially subsidize the cost of providing LIRR commuter service.

6. Under the Transfer Agreement, NY&A received the exclusive right to use certain "Freight Premises," facilities that are used only for freight purposes, including the Farmingdale Yard. The Transfer Agreement also, among other things, provides that NY&A can construct freight-related facilities and structures, including transloading facilities, in connection with the provision of freight services on the Freight Premises. The Transfer Agreement also permits NY&A to enter into contracts, subleases or other agreements with third parties in connection with the provision of freight service on Long Island. However, all fixtures on the Freight Premises become and remain the property of LIRR, and at the termination of the Transfer

Agreement the exclusive right to use the Freight Premises as well as the common carrier obligation will revert to the LIRR.

7. In 2002, NY&A advised LIRR that it had entered into a contract with Coastal Distribution, LLC, under which a shed would be built over part of the tracks in Farmingdale Yard to provide shelter for the transloading of bulk materials. LIRR reviewed the plans for the structure and took no objection since, among other things, they were consistent with the historical and intended use of the yard. However, soon after that time, we became aware that LIRR did not in fact own Farmingdale Yard, but actually leased the real estate from Pinelawn. LIRR initially had difficulty locating copies of the ancient Pinelawn leases and joined with counsel for Pinelawn in locating the leases and determining their terms. LIRR made it clear that it wanted to renew the leases for continued railroad use, and Pinelawn expressed no opposition or disagreement at that time to the yard remaining in LIRR's possession for an additional 99 years.

8. In October, 2003, prior to the commencement of work on the transload structure at Farmingdale, LIRR took steps to assure that the Pinelawn leases remained in effect. LIRR formally exercised its option to renew the November 1905 lease, but the time for renewing the August 1904 Lease had as a technical matter passed, through the inadvertence and delay occasioned by locating and researching these very old instruments. However, Pinelawn had no objection to extending both leases, so LIRR and Pinelawn agreed to reinstate and extend the 1904 lease. Accordingly, by Letter Agreement dated October 17, 2003, LIRR formally exercised its option to renew the 1905 lease, and Pinelawn and LIRR explicitly agreed in writing to reinstate and extend the August 1904 Lease. The Letter Agreement explicitly provides that :

We are hereby agreeing to reinstate and extend the lease dated August 30, 1904 for 99 more years through July 31, 2102. Please have an authorized party concur by signing below

Pinelawn's President, Mr. Stephen Locke, executed the Agreement in the space provided on the Agreement for that purpose, specifically emphasizing in his own hand that Pinelawn's concurrence "refers to the August 30, 1904 Lease."

9. Both the Railroad and Pinelawn understood and intended that this document served to extend the Railroad's possession of the entire Farmingdale Yard for another 99 years. It would make no sense for LIRR to renew only the 1905 Lease without obtaining reinstatement of the 1904 lease, because without the parcel covered by the 1904 lease, the balance of the Farmingdale Yard would be inaccessible to the Railroad's mainline.

10. On January 15, 2004, Pinelawn Cemetery reversed its position, and for the first time claimed that it had not agreed to renew or extend the 1904 Lease, and it subsequently brought suit in the Suffolk County Supreme Court to evict LIRR, NY&A and Coastal Distribution, LLC. That dispute is now before this Board.

11. LIRR purposefully went to the length of renewing the 1905 Lease and reinstating the 1904 Lease to maintain the railroad use of Farmingdale into the distant future. LIRR did so because the Yard is critical to railroad operations on Long Island. It is the only freight facility controlled by LIRR that is suitable for transloading bulk materials. It is the only place east of Brooklyn where a locomotive can be turned. Farmingdale Yard has been continuously used for railroad operations for over a century, and today shippers move thousands of tons of freight through that facility each year.

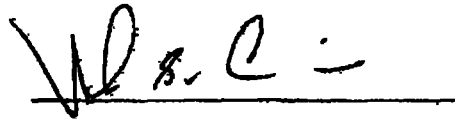
12. Although LIRR has transferred temporary possession and use of Farmingdale Yard to NY&A, at the termination of the Transfer Agreement, either LIRR, NY&A or another operator will assume the freight operations and the common carrier obligations of the LIRR. Farmingdale Yard is and will remain an essential facility for performing those operations without

regard to who the operator may be at the time, and there will still be decades and decades remaining on the leases from Pinelawn Cemetery. LIRR desires and fully intends that the Farmingdale Yard remain available for railroad use – whether for transloading bulk materials, for switching, for car storage or other railroad use—through the end of the 21st Century. LIRR trusts that the Surface Transportation Board will protect this valuable asset from being removed from the national railroad system.

VERIFICATION

I, John B. Curcio, verify under penalty of perjury under the laws of the United States that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Verified Statement.

Executed on July 25, 2011.

A handwritten signature in black ink, appearing to read "J. B. Curcio", is written over a horizontal line.

John B. Curcio

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of July, 2011, a copy of the foregoing Reply of the Long Island Rail Road to Amended Petition for Declaratory Order(with attached verified Statement) was served by mail upon:

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A handwritten signature in black ink, appearing to be "J. Kelly", written over a horizontal line.